

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

75-1439

Docket 75-1439
Cal S-365

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

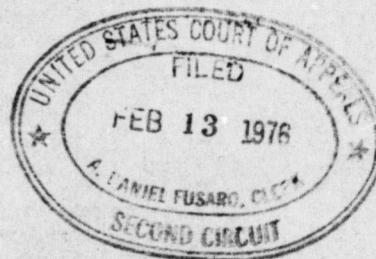
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PPS

-against-

JAMES E. LOFLAND,

Defendant-Appellant.

BRIEF OF APPELLANT AND APPENDIX



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BERNARD JAY COVEN P.C.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

-against-

JAMES E. LOFLAND,

Defendant-Appellant

BRIEF OF APPELLANT AND APPENDIX

BERNARD JAY COVEN
Attorney for Defendant
Appellant
747 Third Avenue
New York, New York 10017
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

0

UNITED STATES OF AMERICA

Appellee

- against -

JAMES E. LOFLAND,

Defendant Appellant

0

BRIEF FOR THE DEFENDANT APPELLANT

STATEMENT

This an appeal by the appellant, James E. Lofland, from a judgment of conviction on all counts of an indictment charging him with violations of Title 18 U.S.C. §§ 1341, 1343, 2314, 1503 and 1510, all together with §2 on each count. The indictment contained eight counts 1,2,4 and 6 charged violations of #1343 and 2; count 3 charged violation of §1341 and 2; count 5 charged violation of §2314 and 2; count 7 charged a violation of §1503 and 2 and count 8 a violation of §1510 and 2. The trial Judge was Owen, J.

The defendant was sentenced to a term of fifteen

years, as follows: on counts 1,2 and 3, five years on each count, to run concurrently with each other; on counts 4,5 and 6, five years on each count, to run concurrently and consecutive to the sentence on counts 1 to 3; on counts 7 and 8, five years on each count to run concurrently and consecutively to the first six counts, for a total term of 15 years.

STATEMENT OF FACTS

The introduction to the indictment alleges that the defendant with the aid of confederates represented to "recently widowed elderly women" that he was developing a country club in Liberal Kansas and certain properties in New Mexico and Oklahoma; that he induced these women to advance sums of money in these properties which was to be repaid from the financing of these projects. The government claims that the defendant did not have the intention to repay these investors but contends used the money for personal expenses and to pay off confederates and the like. The "recently widowed elderly women" who testified at the trial were Esther Armstrong and Myrtle Rupe. With the exception of Myrtle Rupe, who was a major witness, the great bulk of the government's case was taken up with proof of prior convictions of the defendant prior to 1965 and alleged prior similar frauds, including such subjects as the funding of a motion picture and the sale ^{of} oil rights. This latter

proof was admitted to prove "intent" to commit the crimes charged in the indictment, alleged therein to have been committed from March 1972 " to the date of the indictment".

The defendant was primarily engaged in building a country club at Liberal Kansas, the Coranado Country Club and the development of surrounding lots of the club site. While certain of the fairways were not completed and power had not been yet hooked up to a pool, the country club itself was completed and was opened to the public in and about December of 1973 (1159)*. In August of 1974 the club was struck by a tornado and suffered extensive damages (1159). Both Esther Armstrong and Myrtle Rupe invested fairly large sums of money in the club development, each being given assurance of a take out when appropriate financing could be obtained. Mrs Rupe, an interior decorator, decorated various areas of the club, eventually held all of the stock of the corporate owner and was secured by a junior lien, which she recorded. Mrs Rupe was also an officer and from time to time went with the defendant to various lending in-

* Numbers in brackets refer to Trial Transcript pages

stitutions in an attempt to obtain financing for the club (1157). On one occasion Mrs Rupe prepared her own financial statement in an effort to obtain financing for the club (144). As will be indicated below, Mrs Rupe does not believe that she has been defrauded by the defendant and certain of the testimony given by her and the incidents related thereto are in major part the basis for the appeal herein. In connection with Mrs Rupe, an incident occurred in February of 1975^{on} which the government basis its charges in counts 4, 5 and 6 of the indictment. On direct Mrs Rupe testified that in February of 1975 Lofland advised her that he had been introduced to a Michael Gardner, who held himself out as a representative of certain Swiss banking interests. Lofland stated that Gardner would make the country club a loan of \$700,000 and would require a fee of \$14,000 to be held in an escrow type account pending the completion of the financing. Mrs Rupe spoke to Gardner who requested that she come to New York and sign the required agreement (210). If the loan was consummated Lofland would receive \$7,000 from the proceeds (222,238 280) and one Guthrie would receive the sum of \$5,000 as a finder's fee (216,217). Mrs Rupe paid \$14,000, all of which went to Gardner. The loan did not materialize and Gardner suddenly became unavailable. Lofland un-

successfully sought to find Gardner (237) and suggested finally that Mrs Rupe inform the F.B.I. of what had occurred (252). Mrs Rupe made the complaint, and was accompanied to the office of the Federal Bureau of Investigation by Lofland. Lofland never received any part of the \$14,000 given to Gardner.

Another of the Rupe incidents, which counts 7 and 8 of the indictment are bottomed is a request which was made by Lofland of Mrs Rupe to send an affidavit to an attorney, Howard Cerny, indicating his innocence so, as the witness stated Lofland told her, he could (394) clear himself. Lofland made this request on a telephone call from the Bahamas*. On direct Mrs Rupe testified that the affidavit had been drawn and notarized but then she tore it up, keeping the parts (the government put the torn pieces together and introduced a xerox copy into evidence). She told Lofland that she had been before the Grand Jury (298). On direct she said she thought the affidavit false but when she sought to add (or change) her testimony she was abruptly shut off (308). She would complete this testimony when later re-
* Lofland came back to the United States and was arrested in New York

called by the defendant as his witness. She testified on cross that she did not discuss her Grand Jury testimony with anyone (369). After Rupe left the stand she returned to her home in Oklahoma. Thereafter the Court was advised by counsel that Mrs Rupe wished to return to the stand and to add or clarify her testimony. She took a flight to New York and the jury stood by for several hours for her to arrive in New York. She appeared at a late hour of the day and took the stand. She was the sole defense witness.

As a witness for the defense Mrs Rupe testified that she had been cognizant of the background and previous convictions of Lofland (1171). With reference to the affidavit requested by Lofland to be sent to Cerny she did not feel threatened by Lofland when he made that request (1160); that Lofland never told her that he would not repay her if she did not make the affidavit requested (1161) and that the affidavit was true (1163). She also admitted that Lofland had told her of the investments of Mrs Esther Armstrong (1174). Again with respect to the affidavit she testified on cross that authorship of a portion of the affidavit was hers alone (1189,1201). There then followed a persistent line of questioning by the prosecuting attorney which again and again pitted the integrity and veracity of the prosecutor and his office against that of the wit-

ness (13a -20a). Questions were prefaced by the Assistant United States Attorney "Didn't you later on tell me that...(13a); "Is it your testimony that you didn't say that to me" (14a); "When you met with me in October Special Agent Myers was there, right?"(15a); "...in the presence of all of us didn't you make the statement..."(15a). This type of questioning continued over the vehement objections of defense counsel. Motions for mistrial were denied repeatedly. The Court made no effort to admonish the prosecution or to stop the questioning.

Mrs Esther Armstrong, the other "elderly widow", had previous land investment experience, particularly in speculating on undeveloped property (1065). She knew that Lofland was in poor financial condition (1070-1072) and she knew that Lofland could not build without her funds and that she could not get her investment back until the club was refinanced (1081). Mrs Armstrong knew that the club had been open to the public (1061) and opposed the club obtaining a liquor license (1066). She had had a conversation with one Bing Bennett (a government witness) who was associated with an insurance company from whom Lofland was attempting to obtain financing. Bennett told her that the commitment would be made for financing if a proper first mortgage could be obtained (1060). That Bennett was contemplating a loan commitment of his insurance

company to Lofland was confirmed by the testimony of government witness Batie who met Bennett (516).

Mr. Bennet himself testified that he considered the loan "seriously" (905), this although Mr. Bennett's insurance company was extremely cautious in considering loans and indeed he said had never made a previous loan. The Government did not contend that the Professional Underwriters Life Insurance Company was anything but a legitimate licensed insurance company. Mrs Armstrong was a hostile uncooperative witness and had to be admonished by the trial judge at length (1079). A close scrutiny of the claims of this lady demonstrated a claim larded with interest, "lost dividends" and monies advanced to a Mae Belcher long before she met Lofland.

POINT I

PROSECUTORIAL MISCONDUCT IN THE QUESTIONING OF WITNESS RUPE REQUIRES A NEW TRIAL

Rupe, a prosecution witness was recalled as a witness for the defendant. On cross examination the prosecution, again and again, and over the objections of defense counsel, pitted the veracity of the prosecutor and his office staff against the testimony of the witness. The Court refused to grant a motion for mistrial and made no effort whatsoever to stop this wrongful conduct. The jury recognized the

(13a-20a)

conflict and after retiring sent the Court a request that the testimony of Mrs Rupe given on direct, on the government's case with respect to the affidavit be read to them (74a). The credibility of Mrs Rupe was an important factor in this case. Her testimony both direct and cross on the government's presentation ran sever^{al} hundred pages. The Court remarked, with respect to her testimony as a defense witness "She made some material changes in what she said on the government's case" (1204). It was impermissible for the prosecutor to put into issue his own personal integrity. United States v Spangalet, 258 F. 2d 338 (2d Cir. 1958); Berger v United States, 295 U.S. 78, 79 L. Ed. 1314 (1934). The conduct complained of was pronounced and persistent and had an obvious cumulative effect on the jury which cannot be disregarded as inconsequential. A new trial, it is submitted, must be awarded.

POINT II

THERE WAS INSUFFICIENT EVIDENCE
TO SUSTAIN A CONVICTION OF
OBSTRUCTING JUSTICE ON COUNTS
SEVEN AND EIGHT OF THE INDICTMENT

Count Seven

Count seven of the indictment charged a violation of §1503 of Title 18. This count has reference to the affidavit which Lofland requested Mrs Rupe to

prepare and to give to his attorney, Cerny. As indicated above a portion of the affidavit was drafted (1189, 1201) by Mrs Rupe. This request came to Mrs Rupe after she had testified before the Grand Jury. There is no evidence of any "corrupt" conduct on the part of the (1160) defendant. Mrs Rupe was not threatened in any manner, did not feel threatened and there is absent, further, any evidence, except government suggested suspicion that Lofland indicated in any manner that the return of money to Rupe was conditional on her making this (1161) affidavit. The word "corrupt" as used in the statute means "for an evil or wicked purpose" United States v Ryan, (Ca 9 Cal.) 455 F. 2d 728. Nor has there been demonstrated on the evidence the specific intent to impede the administration of justice, which is an essential element of the offense, United States v Ryan, supra, Pettibone v United States, 148 U.S. 197, 37 L. Ed. 419 (1893) [interpreting predecessor statute] The purpose of the statute in question is the protection of witnesses and the "due administration of justice" from corrupt interference. The count went to the jury on the basis of a surmise by the Judge that the affidavit in question was going to be used in a future trial by Lofland's attorney (1124). This

conjecture of facts not shown by the evidence cannot sustain sending to the jury count seven , Cf. Ethridge v United States (1958 Ca 9 Wash.) 258 F. 2d 234. Further, it is not an unlawful attempt to influence or impede a witness for one to seek to obtain from a witness a statement of the facts as he believes them to be, even though such statement may conflict with prior testimony given by the one making the statement , Harrington v United States, (8th Cir. 1920) 267 F. 97, Cole v United States, (9th Cir. 1964) 329 F. 2d 437, cert den. 12 LEd. 2d 497

Count Eight

The defendant moved to dismiss Counts seven and eight. With respect to Count Eight the Court struck a portion of the said Count commencing with the words "and did injure" to the end of the paragraph (1239). Prior to trial the defendant had moved to dismiss ^u Count Eight on the gronnd of duplicity and such motion was denied. It is submitted that the Court erred in striking a portion of the count and should have dismissed the same. The portion struck was plainly not surplusage and the Court, it is submitted, was without power to amend the indictment in that manner, as amendment it plainly was. If the Court had the ability to amend indictments the protection of the Fifth Amendment would be lost. Ex Parte

Bain, 121 U.S. 1, 13. The Federal Rules of Criminal Procedure make no provision for the amendment of indictments. It may be noted that the portion of Count Eight stricken included an allegation that Lofland told Rupe that she could get her money only if he returned and to this end she would have to make an affidavit.

In United States v San Martin, (5th Cir. 1975) 515 F 2d 317, the Court examined the background of §1510 and the elements of proof required. One such element missing in the instant case is the requirement that the action taken must be one to prevent communication being made to an individual authorized to conduct or engage in investigation of the particularly alleged violation. One can hardly contend that the request for the affidavit made in the within case in any manner obstructed communication by Mrs Rupe with the office of the United States Attorney. Certainly, there was no showing or intent to have Mrs Rupe recant anything she had stated to the Grand Jury. Indeed, her testimony before this body was not discussed with anyone.

POINT III

THE COURT ERRED IN CHARGING THE JURY WITH RESPECT TO AIDING AND ABETTING.

The introduction to the indictment, which

which paragraphs were included by reference in each count of the indictment alleged that the scheme charged was devised and conducted by the defendant and confederates. The prosecution produced no "confederates". The Judge suggested that the jury might find Gardner a confederate, but there was no proof in the record as to that, except what hostile guessing might dredge up. The Court should not have charged the jury with respect to aiding and abetting. The defendant timely objected but was overruled (1369 to 1371, 1385). Since there was no principal the defendant could not have been held to have aided and abetted in a ^{vacuum}.

POINT IV
THE PROOF THAT THE DEFENDANT
VIOLATED §2314 WAS INSUFFICIENT

The proof on the count set forth in the point headnote rests on a single phone call made by Lofland to Rupe, who is in the best position to know testified that she was induced to travel to New York by Gardner, who requested that she come to New York and sign an agreement(210). The record is barren of proof that Lofland induced Rupe to come to New York on the Gardner matter nor is there any proof with respect to the defendant that he induced Rupe to travel for the purpose of executing or concealing a fraudulent scheme. Count 5 should have been dismissed.

POINT V

THE GOVERNMENT FAILED TO PROVE BY COMPETENT EVIDENCE THE INTENT REQUIRED TO SUSTAIN A CONVICTION FOR MAIL AND WIRE FRAUD CHARGED IN COUNTS ONE TO FOUR AND SIX OF THE INDICTMENT

The overwhelming portion of the case with respect to the first six counts of the indictment were taken up with matters not charged in the indictment on the theory, of course, of "proving" intent. The Court gave no consideration to counsel's repeated requests to consider the prejudicial effect of much, if not all, of the alleged "prior similar crimes" and the overwhelming hostility it was engendering when weighed against the purported probative value. The defendant had been in prison from 1965 to late 1970. The prosecution successfully introduced evidence of convictions such as a seven year old conviction under the Martin Act of New York. In truth however, the prosecution was proceeding to prove the character of the defendant in order to show that he acted in conformity therewith. In his opening the prosecutor set the stage. After telling the jury that Lofland said he was building a country club (the subject of the instant indictment) and then adds "...on the side he was selling mineral interests, he said he was developing oil and financing movies." The facts then known by the prosecutor was mention of oil and minerals had reference to matters that were approxi-

mately some ten years old as to which the defendant suffered a conviction. Again, the prosecutor told the jury that the defendant had stolen furniture from a home owned by a Dr. Stokes (22), an irrelevant charge never proven at the trial. Again, the prosecutor tells the jury that the defendant "left his "fourth or fifth wife in Kansas" (22), an irrelevant matter even if true. Again, the prosecutor tells the jury that his major witness, Mrs Rupe is a "very religious woman" (24). Again, the prosecutor tells the jury that the defendant can go to the Bahamas "thanks to a new girl friend, Lee Reynolds" (25). In the government's closing the prosecutor states to the jury that they may "find" that the defendant's conduct was in substance a tax evasion scheme (1247). The prosecutor suggests to the jury that the defendant might have violated patent law by the improper use of a service mark (1246). With witness Cynthia West, the Court permitted testimony that Lofland lived with the witness, and had stayed with her at the Hilton Hotel (558). In his opening the prosecutor referred to the defendant as a fugitive from justice prior to his arrest, a matter wholly unproven at the trial. (12).

In any event and with respect to the admission of prior similar criminal acts, assuming arguendo, the previous convictions of the defendant were such, the Court made no attempt to balance the

equities of the probative value of the acts as against, among other factors, the prejudice to the defendant. United States v. Bozza, 365 F. 2d 206 (2nd Cir. 1966). It is submitted that the jury was distracted from the crime actually charged and the defendant was prejudiced.

POINT VI

IT IS SUBMITTED THAT IN ANY EVENT THE SENTENCE OF FIFTEEN YEARS IMPOSED UPON THE DEFENDANT IS WRONGFULLY SEVERE AND REPRESENTS AN ABUSE OF DISCRETION

It is respectfully submitted that a term of 15 years in the instant case was an abuse of discretion of the sentencing judge such as to violate traditional concepts and should therefore be reviewed. United States v. Holder, (2nd Cir. 1969) 412 F. 2d 212.

POINT VII

THE JUDGMENT BELOW SHOULD BE REVERSED AND A NEW TRIAL ORDERED: OR IN THE ALTERNATIVE THE SENTENCE OF THE DEFENDANT HEREIN SHOULD BE REVIEWED.

Respectfully submitted

BERNARD J. COVEN
Attorney for Appellant

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

JAMES E. LOFLAND,

Defendant.

EXCERPTS FROM DOCKET ENTRIES

8-1-75 Filed indictment.

8-28-75 Deft. (atty. present) Pleads not guilty.
Motions ret. in 30 days. Bail \$100,000.
continued. Trial set for 10-29-75 at
10:30 a.m. Case assigned to Judge Owen for
all purposes. Owen, J.

10-7-75 Filed deft's. affidavit & notice of motion
to dismiss the indictment, ret. 10-17-75.

10-7-75 Filed deft's. affidavit & notice of motion
for an election between the offenses charged
in certain counts of the indictment, for a
bill of particulars and for discovery &
inspection, ret. 10-17-75.

10-15-75 Filed deft's. affidavit & notice of motion
for reduction of bail, ret. 10-17-75.

2a

10-22-75 Filed MEMO ENDORSED on deft's. motion for election of counts, etc., filed 10-7-75. The motion to elect between offenses is denied. Motion for a bill of particulars is denied in part & granted in part. Motion for discovery & inspection is granted in part and denied in part.....Owen, J. (mailed notice)

11-11-75 Filed MEMO ENDORSED on deft's. motion to dismiss the indictment. Motion denied.Owen, J. (mailed notice)

11-12-75 Jury empanelled & sworn. Trial begun & continued.

11-13-75 Trial continued.

11-14-75 Trial continued.

11-18-75 Trial continued.

11-19-75 Trial continued.

11-20-75 Trial continued.

11-21-75 Trial continued.

11-24-75 Trial continued.

11-25-75 Trial continued.

11-26-75 Charge to jury & deliberations begin & conclude. Verdict guilty all counts. Bail revoked. Deft. remanded. Pre-sentence investigation ordered. Sentence 12-19-75 at 2:15 P.M.....Owen, J.

12-12-75 Filed deft's. notice of motion for a judgment of acquittal or alternatively for a new trial, ret. 12-19-75.

3a

12-19-75 Filed JUDGMENT & COMMITMENT (atty present)
The deft. is hereby committed to the custody
of the Attorney General or his authorized
representative for imprisonment for a period
of Counts 1, 2 and 3 - FIVE (5) YEARS on each
count to run CONCURRENTLY with each other.
Counts 4, 5 and 6 - FIVE (5) YEARS on each
count to run CONCURRENTLY with each other
and CONSECUTIVELY to counts 1, 2 and 3.
Counts 7 and 8 - FIVE (5) YEARS on each
count to run CONCURRENTLY with each other
and CONSECUTIVELY to counts 1,2,3,4,5,6 for
a TOTAL Prison Term of FIFTEEN (15) YEARS
.....Owen, J.

12-23-75 Filed transcript of record of proceedings
dated Nov. 12,13,14,18,19,20, 1975.

12-23-75 Filed transcript of record of proceedings
dated Nov 21,24,25,26, 1975.

12-22-75 Filed deft's. notice of appeal from the
judgment of conviction entered on 12-19-75
and MEMO ENDORSED - Leave to appeal in forma
pauperis granted.....Owen, J. (Copies
mailed to: James E. Lofland, M.C.C., 150
Park Row, N.Y.C. 10007 and U.S. Attorney's
Office).

4a

Indictment

(SAME TITLE)

INTRODUCTION

The Grand Jury charges:

From in and around March, 1972 up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, JAMES E. LOFLAND (hereinafter called "LOFLAND"), the defendant, together with others known and unknown to the Grand Jury (hereinafter called "confederates"), unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property from victims such as Esther Armstrong and Myrtle Rupe by means of false and fraudulent pretenses, representations and promises.

It was part of this scheme and artifice to defraud that:

LOFLAND arranged, through his confederates, to be introduced to

5a

recently-widowed elderly women and other such victims with the intent of defrauding them of their wealth.

Having, with the aid of his confederates, gained the confidence of these victims, LOFLAND represented to them that he was developing country clubs and other real estate developments on properties in Kansas, New Mexico, and Oklahoma (in which, in fact, his interests were far less than what he fraudulently represented). Further, he fraudulently represented, using false statements and forged documents, that he was able to obtain substantial financing for these developments through insurance companies and other financial institutions.

LOFLAND then induced each victim to make one or more payments of cash and credit, to be used, he falsely represented, for certain immediate expenses

66

in connection with the developments, and which, he falsely promised, would be repaid very shortly from the proceeds of the financing from the financial institutions. To further induce such payments from the victims, LOFLAND transferred to the victims a variety of land mortgages, chattel mortgages, ownership interests, promissory notes, and the like, in which he falsely misrepresented the status of the property, shares, or other collateral involved and fraudulently concealed from each victim the full extent of similar transfers to other victims and parties.

By such fraudulent means, LOFLAND and his confederates defrauded the victims of more than one-half million dollars. LOFLAND had no honest expectation that the victims would ever be repaid any of their cash or credit,

1a

had no intention of repaying them, and never did repay them. Rather, LOFLAND immediately transferred the payments to his personal control and used them in large part, not for the promised uses, but for personal expenses, paying-off confederates, financing his flight to the Bahamas once his fraud was exposed, and the like.

As LOFLAND and his confederates well knew, their aforesaid pretenses, representations and promises were part of a false and fraudulent confidence scheme intentionally designed to defraud the victims of their money and property.

This INTRODUCTION is hereby realleged and incorporated by reference in each and every Count of this Indictment.

COUNTS ONE THROUGH SIX

The Grand Jury further charges:

On or about the dates set forth below, in the Southern District of New York and elsewhere, the

8a

defendant LOFLAND, together with his confederates, unlawfully, wilfully, knowingly and for the purpose of executing and attempting to execute the scheme and artifice to defraud set forth in the INTRODUCTION to this Indictment, did (a) cause certain matter to be placed in post offices and authorized depositories for mail matter, to be sent and delivered by the Postal Service and to be delivered according to the directions thereon, in violation of Title 18, United States Code, Sections 1341 and 2; and (b) cause to be transmitted by means of wire, radio and television communication in Interstate and foreign commerce certain writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, Sections 1343 and 2; and (c) induce persons to travel in and to be transported in interstate commerce in the execution and concealment of schemes and artifices to defraud those persons of money and property having a value of \$5,000 or more, in violation of Title 18, United States Code, Sections 2314 and 2; all as more particularly set forth below:

Qar

<u>COUNT</u>	<u>APPROXIMATE DATE</u>	<u>MATTER OR PERSON IN MAIL OR COMMERCE</u>	<u>TITLE 18, UNITED STATES CODE, SECTION</u>
1	January 31, 1975	Teleggram from LOFLAND in New York, N.Y. to Esther Armstrong in Fort Worth, Texas	1343 and 2
2	January 31, 1975	\$1,000 telegraphic money order sent from Esther Armstrong in Fort Worth, Texas to LOFLAND in New York, N.Y.	1343 and 2
3	January 31, through February 4, 1975	Check for \$3,000 sent through mail from Esther Armstrong in Fort Worth, Texas to LOFLAND in New York, N.Y.	1341 and 2
4	February 14, 1975	Telephone call from LOFLAND in New York, N.Y. to Myrtle Rupe in Oklahoma City, Oklahoma	1343 and 2
5	February 18, 1975	Travel by Myrtle Rupe from Oklahoma City, Oklahoma to New York, N.Y.	2314 and 2
6	February 25, 1975	\$1,000 telegraphic money order sent from Myrtle Rupe in Oklahoma City, Oklahoma to LOFLAND in New York, N.Y.	1343 and 2

10a

COUNT SEVEN

The Grand Jury further charges:

On or about the 5th day of June, 1975, in the Southern District of New York and elsewhere, the defendant LOFLAND, unlawfully, wilfully, and knowingly did corruptly influence, obstruct and impede and endeavor to influence, obstruct, and impede the due administration of justice, to wit: he solicited Myrtle Rupe, a material witness to his fraud, to execute a false affidavit exonerating him from some of his fraud and to mail it to a specified attorney in New York, New York.

(Title 18, United States Code, Sections 1503 and 2.)

COUNT EIGHT

The Grand Jury further charges:

On or about the 5th day of June, 1975, in the Southern District of New York and elsewhere, the defendant LOFLAND, unlawfully, wilfully, and knowingly, did endeavor by means of bribery, misrepresentation, and intimidation, to obstruct, delay, and

prevent the communication of information relating to his violations of criminal statutes of the United States by a person, namely, Myrtle Rupe, to criminal investigators, including Assistant United States Attorneys and Special Agents of the Federal Bureau of Investigation, and did injure Myrtle Rupe in her property on account of the giving by her of said information to said criminal investigators, to wit, LOFLAND having fled to the Bahamas to avoid prosecution and to escape the lawful processes of the Grand Jury and of the United States District Court for the Southern District of New York and knowing that an arrest warrant had been issued out of said District for his arrest and that Myrtle Rupe had been in communication with the United States Attorney's Office for the Southern District of New York and with the Federal Bureau of Investigation, told Myrtle Rupe over the telephone that he could and would return her money only if he could return to the United States without being prosecuted and that, to this end, she would have to execute and mail to a specified attorney in New York, N.Y. the false affidavit referred to in Count

12a

Seven of this Indictment.

(Title 18, United States Code, Sections 1510
and 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

1 mdbr

Rupe-cross

1185

2 out and I had a lot of question marks in my mind.

3 Q Didn't you later on tell me that --

4 MR. COVEN: Objection.

5 Q -- that you had intended to turn Mr. Lofland
6 in but that if he ever found out your life wouldn't be
7 worth a plugged nickel.8 MR. COVEN: I move for a mistrial on the
9 question.

10 THE COURT: Overruled.

11 MR. COVEN: Would your Honor permit me to have
12 the question read?

13 THE COURT: I move it.

14 MR. COVEN: He is putting his integrity on the
15 line, Judge.16 THE COURT: Let us find out what the witness
17 says. Mrs. Rupe, did you ever say that?

18 A Ask me the question again.

19 THE COURT: Read it back.

20 MR. COVEN: Your Honor, I respectfully submit --

21 THE COURT: The objection was overruled.

22 MR. COVEN: I understand. No matter what answer the
23 witness gives because of the form of the question the
24 defense is entitled now to call the prosecutor to the
25 stand, and we are entitled to a mistrial because he has put his

1 mdb

Rupe-cross

1186

2 veracity on the line.

3 THE COURT: The motion is denied. Read the
4 question back, please.

5 (Question read.)

6 A Not in those words, no.

7 Q What did you say, Mrs. Rupe?

8 A I think you got it confused with Michael
9 Gardner. I have always been afraid of him.10 Q Is it your testimony you didn't say that to
11 me?

12 A I said that --

13 Q -- under oath?

14 A I don't remember word for word what I said.

15 MR. COVEN: Just a second. He stated it is under
16 oath and I think we are now entitled to find out where
17 under oath that statement was made to the prosecutor.

18 The question --

19 MR. RAKOFF: I am asking her now under oath.

20 THE COURT: She is now under oath.

21 MR. COVEN: He didn't say that.

22 THE COURT: I understood him to mean that.

23 MR. COVEN: The witness has already --

24 THE COURT: Mr. Coven, please, I have ruled.

25 MR. COVEN: May I state the witness has already

15a
2 answered the question.

3 THE COURT: I have overruled your objection and
4 I have ruled. We will have the question read or reread as
5 necessary and go forward. Please sit down, sir.

6 MR. COVEN: All right, may we have it reread and
7 the answer given?

8 THE COURT: I don't believe it was finished.

9 MR. COVEN: I believe the question was already
10 given that it was Gardner she was afraid of.

11 THE COURT: Put another question, Mr. Rakoff.

12 Q When you met with me in October Special Agent
13 Myers was there, right?

14 A He was there several times when I met with
15 you.

16 Q Bernice Smith, a friend of yours, was there?

17 A Yes.

18 Q Steve Markstein was there?

19 A Yes, sir.

20 Q All right.

21 And on one of those occasions in the presence
22 of all of us didn't you make the statement that I have just
23 asked you about?

24 MR. COVEN: I object to the form of the
25 question, unless he repeats the statement.

16a
2 A No, I can answer.

3 THE COURT: Go ahead.

4 A Truthfully, I think I was talking about Gardner.
5 I did say now one thing about Jim Lofland, I said I would
6 afraid of him if -- well, I don't remember how I put it, to
7 tell you the truth, but I have been afraid of Michael
8 Gardner, I have been afraid of him ever since there have been
9 some incidents at my home and I thought Michael Gardner did
10 threaten my life, and I didn't mean it that Jim would
11 threaten my life because I think he is a mild man, but I don'
12 recall saying my life wouldn't be worth a plugged nickel.
13 I might have said somethingin regard that -- I can't recall
14 those exact words. Was I under oath in your office, I mean?
15 I am under oath now and I am telling you I can't recall
16 this exactly, but I didn't feel secure.

17 Q Mrs. Rupe, do you recall telling Special Agent
18 Myers that you had heard that Jim Lofland had come back
19 into the United States and was staying at the Jockey Club?

20 A Yes, I do.

21 Q Do you recall having a conversation later on with
22 Mr. Myers and me and other people --

23 MR. COVEN: Judge, I --

24 Q -- about --

25 MR .COVEN: I move for a mistrial on two grounds.

2 THE COURT: No, motion is denied.

3 MR. COVEN: May I state the grounds?

4 THE COURT: Not at this time. You may reserve
5 your right to state the grounds later.

6 Next question.

7 Q About what would happen if Jim Lofland had found
8 out you had told us that?

9 A No, I don't recall what I said.

10 Q You don't recall that, do you?

11 A No, I don't.

12 Q Under oath?

13 A Under oath. I did tell Myers over the phone that
14 I had heard that he was back in the states and that he was
15 at the Jockey Club but I did not tell him that he was coming
16 to New York, I didn't know it in any way at all. I was
17 told by one of his friends that he was at the Jockey Club
18 and I told that to Mr. Myers because in my --

19 Q Now, Mrs. Rupe, you were shown that affidavit
20 that you ripped in two?

21 A Yes, sir.

22 Q That was an affidavit that was dictated to you by
23 Jim Lofland, is that right?

24 A Yes.

25 Q Word for word?

1 gabr 1

Rupe-direct

• 3b pm 2 Q You had already made up your mind that you wanted
3 to return back and testify?

4 A I felt real bad that I couldn't talk to you
5 and your assistant because I was not -- I told you I wasn't
6 well enough. I felt b...
7

8 Q Mrs. Rupe, you made up that affidavit at the
9 time you did it because you believed at that time, before yo
10 tore it up perhaps, that it was the right thing to do, is tha
right?

11 A Yes, I did.

12 Q You didn't make up that affidavit for money, . .
13 did you?

14 A No, I didn't make it up for money.

15 Q When you brought the affidavit to Mr. Cerny and
16 found that he could not be Mr. Lofland's attorney, you felt
17 it had no further use and you tore it up, is that correct?

18 A That is right.

19 Q And that is the reason you tore it up?

20 A That's the reason I tore it up.

21 Q Thank you.

22 RECROSS EXAMINATION

23 BY MR. RAKOFF:

24 Q Mrs. Rupe, do you remember telling me and Mr.
25 Myers, other people who were with us when we interviewed

1 gabr 2

19a
Rupe-recross

2 you, that --

3 MR. COVEN: May we have the names? I would
4 like to move for a mistrial again?

5 THE COURT: Overruled.

6 Could you name the other people?

7 MR. RAKOFF: Steve Bartstein, Bernice Smith.

8 Q Do you remember telling them at the time you
9 wrote that affidavit you were desperate?

10 A Yes, I was.

11 Q Why were you desperate?

12 A Because I am losing my home.

13 Q Had you borrowed on your home?

14 A Yes, I had.

15 Q Was that to put up the 14,000 here in New York?

16 A Yes, sir. I borrowed previously.

17 Q The previous times, they were part of the
18 transactions we discussed in this case?

19 A Yes, sir.

20 Q Mr. Lofland told you he was going to come back
21 and bring you all the money?22 A He didn't say all. He would pay me enough to save
23 my house.

24 Q Enough to save your house?

25 A Yes.

1 gabr 4

2 MR. COVEN: Defense calls Mr. Rakoff.

3 THE COURT: Come to the side bar.

4 (At the side bar.)

5 MR. COVEN: Mr. Rakoff has repeatedly asked a
6 number of questions as to his conversations with Mrs. Rupe,
7 what she told him, what she represented to him and what he
8 did and who was present. I made applications for mistrial
9 which your Honor has denied. Therefore, I am entitled
10 to find out what actually was said to Mr. Rakoff and what
11 he did with this witness and what his conversations were.

12 MR. RAKOFF: Your Honor, while I certainly have
13 no objection to testifying, I think that it is merely an
14 attempt when he knows there were other witnesses to the same
15 conversations to try to infect this trial with error.

16 MR. COVEN: I think he is putting his integrity
17 on the line here, Judge.

18 THE COURT: No, he got some answers. The last
19 answer was exactly in line with what he said. The earlier
20 answer the jury could find was not that far off the mark.
21 She gave about half of it and then stopped. Are you going
22 to make anything of the fact that Mr. Rakoff is testifying
23 other than the fact that he is testifying?

24 MR. COVEN: I will do the best I can to make
25 something out of it.

21a

THE COURT'S CHARGE

(SAME TITLE)

9 THE COURT: Mr. Foreman, ladies and gentlemen:
10 We are at the point in this trial where you are soon to under-
11 take your final function as jurors, and it is here, as I said
12 you at the outset of trial, that you will be performing what I
13 regard as one of the most valuable duties and obligations of
14 citizenship in this country, which is to act as ministers of
15 justice in this case and determine in accordance with the
16 instructions that I shall give you and in accordance with
17 the evidence aht you have heard what are the facts in this
18 case, what happened.

19 You are to do this and to discharge your duties
20 with complete fairness, complete impartiality and, as I
21 said when you were selected, you are to do this without any
22 bias or prejudice for or against the government or for or
23 against Mr. Lofland, the defendant, as parties to this
24 case.

25 This is an important case obviously to both sides



2 as well as to the public at large. The fact that the
3 government is a party here entitles it to no greater
4 consideration than that given to any other party in any other
5 lawsuit.

6 By the same token, it is entitled to no less
7 consideration.

8 All parties, whether it be the government, an
9 individual, a corporation or whatever, all stand alike and as
10 equals before the bar of justice.

11 Now, in your role as passing upon the fact
12 issues here, you are the sole and exclusive judges of those
13 facts. That is not my province, that is your province.

14 You determine the weight of the evidence, you
15 appraise the credibility or the believability of the
16 witnesses that you have heard, you draw such reasonable
17 inferences from the evidence as you think are warranted, you
18 resolve such conflict as you may find in the
19 evidence, and in doing this I will later speak of how
20 you can be assisted in determining these issues and
21 determining any questions of credibility or believability
22 that you may find.

23 My final function as the Judge is to instruct you
24 as to the law, and I say to you that it is your duty to
25 accept these instructions of mine and apply them to the

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2 facts as you may find them.

3 (With respect to any fact matter, it is your
4 recollection and yours alone that governs as to what the
5 testimony was.6 As I told you, I think, early in the case, any-
7 thing that any attorney has said in this case with respect
8 to any testimony, whether it is during the trial, in a
9 question, in an argument, in summation or anywhere else, is
10 not to be substituted for your own recollection of the
11 evidence. If there is any substantial question as to what
12 that is, you may have it read back to you.13 So, took, anything that I may have said or may say
14 during the course of this charge with regard to any matter
15 of evidence or testimony is not to be taken in place of your
16 own recollection. I am going to refer to testimony perhaps
17 during the course of this charge and I will endeavor to
18 refer to it as accurately as I recall, but if I were to make
19 a mistake, it is your recollection and yours alone that
20 governs. You are not to take anything that I say as binding
21 upon you as to what the testimony was.22 Now, the fact that I may refer to evidence or
23 testimony during the course of this charge does not mean
24 that I consider that part that I referred to any more importan

2 than any other evidence, for all of the evidence in this case
3 is important, and you are to consider all of it in the
4 course of your deliberations, whether I refer to it or not.

5 If you wish to consider any exhibit in the case,
6 you have only to ask for it and it will be made available for
7 your consideration. You may take a copy of the indictment
8 with you into the jury room.

9 Now, before we get to the precise charges here,
10 let me note a few preliminary things.

11 There are certain essential principles of law
12 which apply in every criminal case. I think I made
13 reference to some of them when you were selected as jurors,
14 and I am going to repeat them for you.

15 The indictment, these pieces of paper, are
16 merely a charge. The indictment is not evidence of
17 anything. It is not proof of anything. It is not
18 proof of the defendant's guilt. No weight whatsoever
19 is to be given to the fact that an indictment has been
20 returned here.

21 The defendant has pleaded not guilty to the
22 charges that are typed upon these pieces of paper. Thus,
23 the government at all times through the course of this
24 trial has the burden of proving these charges against
25 the defendant beyond a reasonable doubt.

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2 The defendant does not have to prove anything.
3 He doesn't have to prove his innocence. He doesn't have
4 to prove anything at all.

5 On the contrary, he is presumed to be innocent
6 of the charges contained in this indictment. This pre-
7 sumption of innocence was in his favor at the start of the
8 trial. It continues in his favor throughout the trial.
9 It is in his favor even as I am instructing you at this
10 moment, and it remains in his favor during the course of your
11 deliberations in the jury room, the presumption of inno-
12 cence being removed only if and only when you are satisfied
13 that the government has sustained its burden of proving
14 the guilt of the defendant beyond a reasonable doubt under
15 the charge. Then at that point the presumption of
16 innocence would fall away.

17 Now, the question that comes up is what is a
18 reasonable doubt?

24 Reasonable doubt is a doubt which appeals to your
25 reason, your judgment, your common sense and your experience.

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1 gabr

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2 Reasonable doubt is not caprice, whim, speculation,
3 guess work, conjecture or suspicion. Reasonable doubt is
4 not an excuse to avoid the performance of an unpleasant
5 duty. It is not sympathy for a defendant.

6 If, after a fair and impartial consideration of
7 all the evidence, you can candidly and honestly say
8 that you are not satisfied of the guilt of the defendant,
9 that you do not have an abiding conviction of his guilt,
10 then, in sum, if you have such a doubt as would cause you as
11 a prudent person to hesitate before acting in matters of
12 importance to yourself, then you have a reasonable doubt.
13 In that circumstance it is your duty to acquit.

14 If, on the other hand, after such impartial and
15 fair consideration of all the evidence you can candidly
16 and honestly say that you do have an abiding conviction
17 of the defendant's guilt, such a conviction as you would be
18 willing to act upon in important and weighty matters in
19 the personal affairs of your own life, then you have no
20 reasonable doubt, and under such circumstances it is your duty
21 to convict.

22 One final word on the subject. Reasonable
23 doubt does not mean a positive certainty or beyond all
24 possible doubt. If that were the rule, few persons, however
25 guilty, would be convicted. It is practically impossible for

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2 a person to be absolutely and completely convinced of any
3 contraverted fact which by its nature is not susceptible
4 of proof by mathematical certainty.

5 Thus, the law in a criminal case is that it is
6 sufficient that the guilt of the defendant is established
7 beyond a reasonable doubt, not beyond all possible doubt.

8 Now, let us turn to the indictment and that
9 portion of it which contains the six counts that charge
10 violation of the federal antifraud statutes.

11 These are generally referred to as the mail
12 fraud, the wire fraud and the travel fraud statutes.

13 The indictment contains an introduction followed
14 by six specific counts. I am going to read these to you.

15 "From in and around March, 1972 up to and
16 including the date of the filing of this indictment" --
17 which I tell you was filed on the 1st of August of 1975 --
18 "in the Southern District of New York and elsewhere" --
19 and I advise you in that connection that the Southern
20 District of New York includes the Island of Manhattan
21 and all the counties of New York, above it, almost up to
22 Albany, for practical purposes -- "James E. Lofland,
23 the defendant, to go with others known and unknown to
24 the grand jury, hereinafter called confederates, unlawfully,
25 wilfully and knowingly did devise and intend to devise a

1 gabr

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2 scheme and artifice to defraud and to obtain money and
3 property from victims such as Esther Armstrong and Myrtle
4 Rupe by means of false and fraudulent pretenses, representa-
5 tions and promises.

6 "It was part of this scheme and artifice to
7 defraud that:

8 "Lofland arranged, through his confederates,
9 to be introduced to recently widowed elderly women and
10 other such victims with the intent of defrauding them
11 of their wealth. Having with the aid of his confederates
12 gained the confidence of these victims, Lofland represented
13 to them that he was developing country clubs and other real
14 estate developments on properties in Kansas, New Mexico and
15 Oklahoma in which, in fact, his interests were far less
16 than what he fraudulently represented. Further, he
17 fraudulently represented, using false statements and forged
18 documents, that he was able to obtain substantial financing for
19 these developments through insurance companies and other
20 financial institutions.

21 "Lofland then induced each victim to make
22 one or more payments of cash and credit, to be used, he
23 falsely represented, for certain immediate expenses in con-
24 nection with the developments, and which, he falsely
25 promised, would be repaid very shortly from the proceeds of

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2 the financing from the financial institutions.

3 " To further induce such payments from the victims,
4 Lefland transferred to the victims a variety of land mort-
5 gages, chattel mortgages, ownership interests, promissory
6 notes and the like, in which he falsely misrepresented
7 the status of the property, shares or other collateral
8 involved and fraudulently concealed from each victim to him
9 the full extent of similar transfers to other victims and
10 parties.

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2 "By such fraudulent means, Lofland and his
3 confederates defrauded the victims of more than one half
4 million dollars. Lofland had no honest expectation
5 that the victims would ever be repaid any of their cash or
6 credit, had no intention of repaying them, and never did
7 repay them. Rather, Lofland immediately transferred the
8 payments to his personal control and used them in large
9 part, not for the promised uses, but for personal expenses,
10 paying off confederates, financing his flight to the
11 Bahanas once his fraud was exposed, and the like.

12 "As Lofland and his confederates well knew, their
13 aforesaid pretenses, representations and promises were part
14 of a false and fraudulent confidence scheme intentionally
15 designed to defraud the victim of their money and property.

16 "This introduction is hereby realleged and
17 incorporated by reference in each and every count of this
18 indictment."

19 This charge then continues as follows:

20 "Counts 1 through 6.

21 "The grand jury further charges:

22 "On or about the dates set forth below, in the
23 Southern District of New York and elsewhere, the defendant
24 Lofland, together with his confederates, unlawfully, wil-
25 fully, knowingly and for the purpose of executing and

1 gwarf 2

2 attempting to execute the scheme and artifice to defraud
3 set forth in the introduction to this indictment, did,

4 (a) cause certain matter to be placed in post offices and
5 authorized depositores for mail matter, to be sent and
6 delivered by the Postal Service and to be delivered accord-
7 ing to the directions thereon, in violation of Title 18,
8 United States Code, Sections 1341 and 2;

9 "And (b) caused to be transmitted by means of
10 wire, radio and television communication in interstate
11 and foreign commerce certain writings, signs, signals,
12 pictures and sounds in violation of Title 18, United States
13 Code, Sections 1343 and 2;

14 "And, (c) induced persons to travel in and to
15 be transported in interstate commerce in the execution and
16 concealment of schemes and artifices to defraud those persons
17 of money and property having a value of \$5,000 or more,
18 in violation of Title 18, United States Code, Sections
19 2314 and 2: all as more particularly set forth
20 below."

21 Thereafter is listed six separate areas under
22 appropriate columns.

23 Count 1 charges that on or about the approximate
24 date January 31, 1975 there was a telegram from Lofland
25 in New York to Esther Armstrong in Forth Worth, Texas.

1 gwrf 3

2 The section of the law is set forth after it.

3 Count 2 charges that on or about the approximate
4 date January 31, 1975, \$1,000 telegraphic money order
5 sent from Esther Armstrong in Fort Worth, Texas to Lofland
6 in New York.

7 Count 3 charges that on or about the approximate
8 date January 31st through February 4, 1975 a check for
9 \$3,000 sent through mail from Esther Armstrong in Fort
10 Worth, Texas to Lofland in New York.

11 Count 4, that on or about the approximate date
12 February 14, 1975, telephone call from Lofland in
13 New York to Myrtle Rupe in Oklahoma City, Oklahoma.

14 Count 5 charges that on or about February 18, 1975,
15 travel by Myrtle Rupe from Oklahoma City to New York.

16 Count 6 charges that on or about February 25,
17 1975, \$1,000 telegraphic money order sent from Myrtle Rupe
18 in Oklahoma City, Oklahoma to Lofland in New York.

19 These are six specific acts, each of which is
20 alleged to be a violation of a section of law that I will
21 charge you in more detail in a minute or two.

22 Now, I have mentioned to you three statutes which
23 are referred to as mail fraud, wire fraud and travel fraud
24 statutes. The introductory wording of these statutes
25 is identical and reads -- this is the statute itself,

1 gwrf 4

2 the law itself --

3 "Whoever, having devised or intending to devise
4 any scheme or artifice to defraud, or for obtaining money
5 or property by means of false or fraudulent pretenses,
6 representations or promises," -- and from that point on the
7 statutes differ.

8 Thus, the mail fraud statute, in pertinent part,
9 continues by making it a crime when any person:

10 "For the purpose of executing such scheme or
11 artifice, or attempting so to do, places in any post office
12 or authorized depository for mail matter ... to be sent or
13 delivered by the Postal Service, or takes or receives
14 therefrom, any such matter ... or knowingly causes to be
15 delivered by mail ... any such matter ..."

16 In short, the use of the mails in furtherance
17 of a fraudulent scheme is prohibited.

18 A separate statute, using the same introductory
19 language I read to you earlier as to a scheme or artifice
20 to defraud, makes it a criminal offense when one:

21 "... Transmits or causes to be transmitted
22 by means of wire, radio or television communication in
23 interstate or foreign commerce, any writings, signs,
24 signals, pictures, or sounds for the purpose of executing
25 such scheme or artifice."

1 gwrf 5

2 This statute, the Wire Fraud Act, and the
3 language referred to generally extend to the use of interstate
4 or foreign facilities such as telephones, telegrams and
5 cables.

6 Still another statute with respect to such fraudu-
7 lent scheme makes it a criminal offense -- this is the
8 travel -- when anyone:

9 "Transports or causes to be transported, or
10 induces any person to travel in, or to be transported in
11 interstate commerce in the execution or concealment of
12 a scheme or artifice to defraud that person of money
13 or property having a value of \$5,000 or more."

14 The indictment charges violations of each of these
15 statutes -- the numbers are listed here in the indictment--
16 depending upon whether it is the use of the mails, telephone,
17 telegrams, cables or travel in the alleged execution
18 or furthering of the scheme to defraud.

19 I also instruct you as to another federal statute
20 in the event you find it applicable which provides that a per-
21 son who:

22 "Aids, abets, counsels, commands, induces or pro-
23 cures," the commission of an offense against the United
24 States is equally punishable as the person who "commits
25 the offense."

1 gwrf 6

2 Thus, under the law regarding aiding and abetting,
3 a person who wilfully causes an act to be done which, if
4 directly performed by him or another, would be an offense
5 against the United States is responsible for it as if
6 he himself had caused the act to be done.

7 Later I shall instruct you in more detail as
8 to the aiding and abetting statute.

9 Now, as you have just heard at some length,
10 the part of the indictment which charges fraud has two parts.
11 The first is an introduction and the second part consists
12 of the several counts.

13 Now, the crime with which Defendant Lofland is
14 charged in each count is doing an act or causing or
15 abetting or aiding someone else to do such an act, such
16 as using the mails or the interstate wire facilities
17 or traveling in interstate commerce in order to further
18 or execute the scheme to defraud as outlined in the
19 introduction.

20 In order to find that the defendant, Mr. Lofland,
21 violated the mail fraud, wire fraud or travel fraud
22 statutes, the Government must prove beyond a reasonable
23 doubt the following elements:

24 One, that a scheme or artifice to defraud
25 or to obtain money by false and fraudulent pretenses,

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1 gwrf 7

2 representations or promises, was devised by the defendant
3 or that he aided and abetted others to devise such
4 a scheme or artifice.

5 Two, that the defendant knowingly and wilfully
6 participated in the scheme or artifice to defraud, with
7 knowledge of its fraudulent nature and with intent to
8 defraud or that he knowingly and intentionally aided and
9 abetted others to do so.

10 And, three, that as to each count there occurred,
11 in execution or furtherance of that scheme, the use of
12 the mails or the use of interstate wiring facilities,
13 or the interstate travel by a victim specified in the
14 particular count.

15 Let us consider each element separately.

16 The first element of the offense is the existence
17 of a scheme or an artifice to defraud. The language
18 describing this element is almost self-explanatory.

19 A scheme or artifice is merely a plan for the
20 accomplishment of an object.

21 A scheme to defraud is a plan, device or course
22 of action to obtain money or property by means of false or
23 fraudulent pretenses, representations or promises calculated
24 to deceive persons of average prudence.

25 In short, it embraces any scheme, artifice,

2 trick, device or deceit intended to deprive a person of
3 his money or property, whether by false representation
4 or suppression of truth or by a deliberately reckless
5 disregard for the truth.

6 A statement, representation, claim or document
7 is false if it was untrue when made and was then known
8 to be untrue by the person making it or causing it to be
9 made, or if he deliberately and recklessly blinded
10 himself to the knowledge that it was false.

11 A statement, representation, claim or document
12 is fraudulent if it was falsely made or caused to be
13 made with intent to deceive the victim.

14 The fraud condemned by the statute is not
15 limited to active misrepresentation. A fraudulent
16 scheme may exist although no express misrepresentation of
17 fact is made. Indeed, a statement may be fraudulent,
18 if, although literally true, it omits the material facts
19 necessary to make the statement, in the context in
20 which it is made not misleading. The deceitful
21 concealment of material facts or the deceitful repre-
22 sentation of half truths may also constitute an actual
23 fraud, and the devising of a scheme for obtaining money or
24 property by such half truths or concealment or by creating
25 false impressions is in violation of the statutes.

2 If there is deliberate deception, the manner
3 in which it is accomplished is immaterial.

4 In very broad outline, the Government contends
5 that Lofland's scheme was to induce people to give
6 him money directly or indirectly in such forms as
7 loans, investments, payments of bills and expenses,
8 extending credit, putting up collateral and the like.

9 Lofland, the Government contends, induced these
10 transfers by a number of different fraudulent repre-
11 sentations, principally regarding the country club in
12 Kansas, land in New Mexico, Keystone, Oklahoma, and that
13 they would get their money back very shortly from the
14 proceeds of loans that had been assured by major financial
15 institutions.

16 If you find that Mr. Lofland made a fraudulent
17 representation or representations as part of this
18 scheme, I charge you that the law does not require that
19 the Government prove all the false pretenses, fraudulent
20 representations or concealments charged in the indictment.

21 It is sufficient if it proves beyond a reasonable
22 doubt as to whichever of the first six counts you are
23 considering that at least one false pretense, mis-
24 representation or concealment of a material fact was made
25 in furtherance of the scheme to defraud.

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Similarly, even though the Government contends that the defendant, in fact, appropriated the victim's money for uses other than those he pretended he was using them for, and even though you are entitled to consider any such evidence and that you find as bearing on the defendant's intent, nevertheless, since the crime charged is the devising and attempted execution of a scheme to defraud, it is not necessary that you find that the defendant, in fact, realized any gain at all from the scheme, nor is it necessary for the Government to establish the victim's suffered any loss, although the Government obviously does so contend.

14 In short, while the Government at all times
15 has the burden of proving each of the essential elements
16 of the scheme to defraud, it is not required to prove that
17 every step of the scheme was fully accomplished. The
18 crime is complete if you find that the scheme was conceived
19 and that the mails, wires or travel facilities were used
20 in an attempt to further it.

21 Thus, the question is: Did the defendant
22 knowingly devise or aid and abet a scheme to defraud
23 and obtain money and property of which the mails,
24 the wires or interstate travel were used to further the
25 scheme?

2 As I have said, whether or not the scheme
3 actually succeeded in any given instance is not the
4 question.

5 However, in determining whether a scheme
6 existed, you may draw reasonable inferences from its
7 success if you find that it did, in fact, succeed.

8 Since the devising of a scheme or an artifice
9 concerns the defendant's conduct and intent, should you
10 find that a scheme to defraud existed, it is no defense
11 that persons defrauded were themselves induced to make
12 inaccurate representations or enter into agreements
13 that they could not fulfill. Let me read that to you
14 again because I don't think the total sense of it came
15 through. Since the devising of a scheme or artifice
16 concerns a defendant's conduct and intent, should you
17 find that a scheme to defraud existed, it is no defense
18 that persons defrauded were themselves induced to make
19 inaccurate representations or enter into agreements that
20 they could not fulfill.

21 Thus, if you find that Mr. Lofland devised
22 a scheme to defraud, it is no defense that Myrtle Rupe's
23 financial statement may have been inflated, and particularly
24 so if you find that this was a reflection of the values
25 which Defendant Lofland induced her to accept as

2 to his notes and investments and the value of his property.

3 The second element under each count that the
4 Government must prove beyond a reasonable doubt in order
5 to convict the defendant is that he participated in the
6 scheme or artifice to defraud knowingly, wilfully and
7 with an intent to defraud.

8 "Knowingly," means to act purposely and
9 deliberately, rather than through mistake, inadvertence
10 or other innocent reason -- in short, that one is aware
11 of what one is doing.

12 "Wilfully," means to act intentionally, with
13 a bad purpose either to disobey or to disregard the law.

14 "Intent to defraud" means to act knowingly and
15 with the specific intent to deceive for the purpose of
16 either causing some financial loss to another and/or
17 bringing about financial gain to one's self.

18 Since an essential element of the crime charged
19 is a specific intent to defraud, it follows that good
20 faith on the part of a defendant is a complete defense.
21 I remind you, however, that a defendant has no burden
22 to establish a defense of good faith. The burden is
23 upon the Government to prove fraudulent intent and
24 consequent lack of good faith beyond a reasonable doubt.

25 I further instruct you in this area that one

2 who acts with honest intention is not chargeable with
3 fraudulent intent. One who expresses an opinion honestly
4 held by him, or a belief honestly entertained by him, is
5 not chargeable with fraudulent intent even though such
6 opinion is erroneous and such belief is
7 mistaken. Evidence which establishes only that a person
8 made a mistake in judgment or an error in management,
9 or was careless, does not establish fraudulent intent.

10 However misleading or deceptive a plan may be,
11 it is not fraudulent if it was devised and executed
12 in good faith or there was an honest belief in the
13 truth of the representations made. At the same time,
14 it is no defense that the defendant, knowing that his
15 representations were false or that his actions were
16 fraudulent, spoke or acted out of a belief that ultimately
17 everything would work out so that no one would suffer
18 any monetary loss. Nor is it a defense that the defendant
19 first made his representations in good faith if you find
20 that later within the period charged in the indictment,
21 he realized the representations were false and yet
22 deliberately continued to make them.

23 The Government has introduced other
24 evidence of what the Government contents were other frauds
25 committed by the defendant aside from those charged in

2 the indictment, evidence, which you may recall, I admitted
3 as bearing, if you credited that evidence, on this issue
4 of intent. Obviously, a central question here is the
5 defendant's intent. Proof as to the defendant's conduct
6 towards certain others outside the scope of the indictment,
7 such as Arnold Goodman, who testified to certain events
8 after the filing of this indictment on August the 1st of
9 1975, and Louise Denison, who testified to certain
10 events in 1971, before the date alleged in the indictment,
11 March of 1972, that evidence was admitted solely on
12 that issue alone.

13 If you credit it, it may be considered by you.
14 But, as I say, only on the issue of the defendant's
15 intent with regard to those items that are charged in this
16 indictment.

17 What was his intent with regard to those? It
18 is to be considered by you on that issue alone and on none
19 other.

20 Similarly, there was admitted in evidence proof
21 of defendant's guilty plea in a fraud case in New York
22 State. That evidence, too, assuming you credit was
23 admitted solely for whatever bearing you find it
24 has upon the question of his intent with regard to the
25 matters that are charged in the indictment on which he is

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2 on trial here and for no other purpose.

3 The Government can also meet its burden that
4 the defendant had knowledge of the falsity of his rep-
5 resentations if it establishes beyond a reasonable doubt,
6 to your satisfaction, that he acted with a reckless dis-
7 regard of whether the statements were true or false
8 and with a conscious purpose to avoid learning the truth.

9 The question of the defendant's intent is
10 a question of fact that you are called upon to decide
11 just as you determine any other fact issue.

12 Knowledge and intent in the mind of another is
13 subjective. That involves what is going on in his head.
14 Now, medical science has not devised any means by which
15 we can look into a person's head and determine what
16 knowledge or intent he had at some earlier date. So you
17 must reason from the evidence in the case. In so doing,
18 you may reason from both direct and from circumstantial
19 evidence, assuming you credit that particular evidence.

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2 Now, direct evidence is the testimony of what
3 somebody saw, heard, something that occurred in the
4 person's presence, as to which they testified before you.

5 Circumstantial evidence is evidence where
6 there has been proof of one fact from which you can
7 reasonably conclude that another fact exists.

8 Let me give you an example the courts have
9 used longer than I care to remember.

10 Let us assume this morning as you came into the
11 courthouse the sun was shining and the blinds were drawn.
12 You took your seats in the jury box and had no occasion
13 to see outside.

14 During the course of the morning a person
15 comes in with a raincoat shaking drops of water off of it,
16 another person comes in with an umbrella similarly
17 dripping water.

18 What you saw, the raincoat and umbrella was
19 direct evidence, because that was observed. However,
20 from that fact you may conclude that outside, after
21 you came into the building, the sun had stopped shining
22 and it had begun to rain.

23 In other words, you deduced that fact circum-
24 stantly from the direct evidence that is before you.

25 That is all there really is to circumstantial

2 evidence, which is that you may deduce
3 a second fact that logically follows from one that is
4 directly proved to you.

5 Circumstantial evidence, if you credit it,
6 is of no less weight in your deliberations than is
7 direct evidence.

8 Thus, knowledge and intent of a defendant,
9 though subjective, may be inferred or gathered from
10 a person's outward manifestations. His conduct, his words,
11 his acts, and from all the objective facts and circum-
12 stances disclosed by the evidence and the reasonable
13 inferences to be drawn therefrom, or from the circum-
14 stantial evidence, if you so find.

15 Conduct of a defendant may be considered in
16 the light of other evidence in the case if it tends
17 to prove an issue material to the charge. Thus, a false
18 exculpatory statement, if you so find, may be
19 considered as circumstantial evidence of fraudulent
20 intent.

21 The Government here contends that the affidavit
22 allegedly dictated by the defendant to Mrs. Rupe is
23 such a false exculpatory statement procured by the
24 defendant.

25 If you so find, you may consider it as bearing upon

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2 the defendant's intent as to the first six counts in the
3 indictment.

4 Still other evidence, if you credit it, such
5 as the alleged threat conveyed to Mr. Lester McGhee,
6 or the defendant's alleged statement to Cynthia West
7 to keep your trap shut, an allegedly fraudulent offer
8 to Myrtle Rupe to bring her some money from the Antilles
9 Bank if she first helped Lofland raise bail, may be
10 considered by you as bearing upon Mr. Lofland's knowledge
11 and intent in this case.

12 Let me say that all of these determinations
13 are exclusively for you to make or not to make, as you
14 see fit in accordance with these instructions on the law
15 to you.

16 Now, I have given you the first two elements
17 that would apply to all six of these fraud charges.
18 As you gathered, the first two elements are common to
19 all six, but there is a third element that varies
20 as between the six.

21 The third element is as to a mail fraud
22 count. This now deals with Count 3. Count 3 is the
23 mail fraud count.

24 Before a defendant may be found guilty on
25 Count 3, the mail fraud count, in addition to the other

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2 two elements as to which I have charged you, the Government
3 must prove beyond a reasonable doubt the use of the mails
4 in furtherance of the scheme to defraud. It is not
5 necessary to show that the defendant in question actually
6 mailed any item referred to. It is sufficient if
7 you find that the defendant caused the mailing by others.

8 Count 3, as you may remember from my reading, is
9 the allegation that Esther Armstrong sent a \$3,000 check
10 through the mail to Mr. Lofland sometime from January 31st
11 through February 4, 1975.

12 Now, where one does an act with knowledge
13 that the use of the mails will follow in the ordinary
14 course of business, or where such use of the mails can
15 reasonably be foreseen even though not actually intended,
16 then he causes the mails to be used.

17 The mailed matter need not disclose on its
18 face a fraudulent representation or a request for
19 money. It may be wholly innocent. Here, the count
20 in question, as to which I have just read you, refers
21 to the \$3,000 check which the Government contends
22 was sent through the mail from Mrs. Armstrong in Fort
23 Worth to the defendant in New York at the defendant's
24 request and solicitation and in furtherance of his overall
25 scheme.

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The Government contends it was reasonably contemplated the mails would be used in the course of this scheme and therefore that you may find that the defendant caused the mailing.

The Government must also establish beyond
a reasonable doubt that the particular mailing charged
in Count 3 occurred during the existence of the scheme
and its furtherance.

Now, let's turn to the wire fraud counts.
Those are 1, 2, 4, and 6. To sustain its charge that
the defendant is guilty on the wire fraud counts the
Government must prove again in addition to the two
common elements that I have previously mentioned to you
that for the purpose of executing the fraudulent
scheme or artifice the defendant caused the transmission
of sounds and signals by wire communication in interstate
commerce, or caused, aided and abetted such use of
interstate wire facilities by another.

20 I instruct you that interstate telephone calls
21 or telegrams constitute the use of wire communication
22 within the statute.

23 Count 1 refers to a telegram from Lofland
24 to Esther Armstrong in Fort Worth, approximate date
25 January 31, 1975.

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2 Count 2 refers to a \$1,000 telegraphic money
3 order sent from Esther Armstrong in Fort Worth, Texas
4 to Lofland in New York January 31, 1975.

5 Count 4 refers to a telephone call from Lofland
6 in New York to Myrtle Rupe in Oklahoma City on February
7 14, 1975.

8 Count 6 refers to a telegraphic money order
9 for \$1,000 from Myrtle Rupe in Oklahoma City to Lofland
10 in New York, approximate date February 25, 1975.

11 All of these, obviously, refer to types of wire
12 communication within the statute.

13 If you find that the defendant caused interstate
14 telephone calls to be made, or telegrams to be sent
15 in pursuance of a scheme to defraud, it is irrelevant
16 whether the defendant was the one who placed the calls
17 or sent the telegrams.

18 As with the mails, the defendant need not himself
19 have directly participated in the telephone conversation,
20 nor himself have sent the telegram, nor even have specific
21 knowledge of the wire communication. It is sufficient
22 if you find the defendant caused such communication
23 directly or indirectly or aided and abetted someone else
24 in so communicating.

25 Under the wire fraud statute there is no

2 requirement that the accused know that the instrumentalities
3 of interstate commerce are used or that he foresee
4 that such instrumentalities may be used.

5 Now, let's go to the travel count, which is
6 Count 5.

7 In addition to the two elements common to all
8 the counts to establish the defendant is guilty on the
9 travel count the Government must prove beyond a reasonable
10 doubt that, in addition, the defendant for the purpose
11 of furthering his scheme to defraud a person of \$5,000
12 or more induced that person to travel in interstate
13 commerce or caused or aided and abetted someone else
14 to induce such travel.

15 Count 5 alleges that on or about February
16 18, 1975, there was travel by Myrtle Rupe from Oklahoma
17 City, Oklahoma, to New York, New York, in furtherance
18 of the scheme to defraud.

19 To induce a person to travel simply means
20 to cause a person to do something or persuade or to
21 influence or to stimulate acts on the part of another
22 person. There is no requirement under the travel
23 statute that the accused specifically know, foresee,
24 or intend that a person would be induced to travel
25 in interstate commerce. It is enough if you find that

2 the defendant knowingly participated in a scheme which
3 by its nature involved interstate travel, and that
4 such travel actually occurred.

5 In the case of Count 5, the travel referred to,
6 according to the Government's contention, is when
7 following the call from the defendant, Myrtle Rupe flew
8 from Oklahoma City, Oklahoma to New York in connection
9 with the giving of a \$14,000 check to Michael Gardner
10 in New York City.

11 While we are talking about this count I want
12 to bring to your attention that while Count 5 charges that
13 the approximate date of Mrs. Rupe's travel to New York
14 is alleged as February 18, 1975, it appears conceded by
15 both parties that the precise date was actually February
16 17th.

17 Such a minor variance, I charge you, is
18 immaterial. Specifically, I instruct you that it does not
19 matter if a specific transaction is alleged to have occurred
20 on or about a certain date and the testimony indicates
21 that it was in fact on another date. The law only
22 requires a substantial similarity between the dates
23 alleged in the indictment and the date established
24 by the testimony.

25 Similarly, while the amount obtained or

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2 to be obtained by the scheme to defraud must be found
3 by you to be in excess of \$5,000, insofar as Count 5
4 is concerned, whether the amount realized or to be realized
5 by the scheme was a half million dollars or some
6 greater or lesser figure is not material. If you found
7 that all of the elements of the crime had been proven,
8 but that the amount of the fraud amounted only to, let's
9 say, \$450,000, you would be under just as much of an
10 obligation to find the defendant guilty as if it were
11 the \$500,000 or more charged in the indictment.

12 By this I mean assuming that you found all of
13 the requisite elements of the charges to be
14 met beyond a reasonable doubt.

15 Again, it is not required that the Government
16 prove that the scheme to defraud started on and ended on
17 the dates alleged in the indictment. It is sufficient
18 if you find that in fact a scheme to defraud existed
19 at sometime during the period.

20 The fact that the Government may have proved
21 that on the one hand the scheme began either before or
22 after March 1972, or that on the other it ended before
23 or after August 1, 1975, is not of any importance,
24 as long as you find that the scheme was in fact in
25 existence at sometime between those two dates.

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Once again, as I previously said, it is not necessary that the Government prove every aspect of the scheme to defraud as it is described in the introduction to the indictment as long as it proves enough of the scheme to meet with the legal requirements as to which I have already charged you.

8 In this regard, I also want to charge you that
9 a material fact -- and you have heard me make mention
10 of a material fact -- is one that would matter to a reasonable
11 person in reaching a decision to make a loan or an
12 investment or otherwise extend money or credit in reliance
13 upon it or in response to it.

14 However, the Government need not prove that
15 any particular misrepresentation was in fact relied
16 upon, but only that it was the kind that the maker would
17 expect to be relied upon.

18 Now, the indictment charges Mr. Lofland with
19 acting along with confederates. In this regard, the
20 Government contends that the aiding and abetting statute
21 is applicable.

22 I charge you that any person, obviously, who
23 commits an act that the statute declares to be a crime
24 has committed that crime, obviously. It is also a crime,
25 however, to aid or abet, or procure or induce another

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2 person to commit such an act. The aiding and abetting
3 statute, Title 18, U. S. Code, Section 2, reads as follows:
4 "Whoever commits an offense against the United States
5 or aids, abets, counsels, commands, induces or procures
6 its commission is punishable as a principal.

7 B. Whoever wilfully causes an act to be
8 done which if directly performed by him or another would
9 be an offense against the United States is punishable
10 as a principal.

11 In order to find that a defendant aided or
12 abetted others to commit the offenses charged in the
13 substantive counts, you must find that Mr. Lofland
14 in some way associated himself with and participated
15 in the criminal venture of devising a scheme and
16 artifice to defraud, that he wished to bring it about,
17 and that by his acts he endeavored to make it successful.

18 Participation by the defendant in a criminal
19 venture may be shown by any act designed to promote or
20 further the criminal venture which you find was
21 committed by the defendant.

22 To find the defendant guilty of aiding and
23 abetting you must find something more than a mere knowledge
24 on his part that the crime was being committed, since
25

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2 being a mere spectator at a crime does not make a
3 man a participant. It is not necessary, however, to find
4 that he himself did any of the criminal acts, since
5 participation in a crime can, for example, be shown if
6 you find that he aided or counseled another to commit the
7 crime.

8 In determining whether a defendant participated
9 in a criminal venture you may consider whether that
10 defendant had any stake in the venture or any motive to
11 aid the venture.

12 Now, let us turn to the final two counts of
13 the indictment. The defendant is charged in Count 7
14 with violating Title 18, Section 1503. Pertinent
15 provisions of that statute read as follows:

16 "Whoever corruptly influences, obstructs,
17 or impedes, or endeavors to influence, obstruct or impede
18 the due administration of justice commits a crime."

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2b 2 Now, Count 7 of the indictment reads as
3 follows:

4 "On or about the 5th day of June, 1975, in the
5 Southern District of New York, and elsewhere, the defendant
6 Lofland unlawfully, wilfully and knowingly did corruptly
7 influence, obstruct, and impede and endeavor to influence,
8 obstruct and impede the due administration of justice,
9 to wit, he solicited Myrtle Rupe, a material witness to his
10 fraud, to execute a false affidavit exonerating him from
11 some of his fraud and to mail it to a specified attorney
12 in New York City."

13 The purpose of the statute involved here is
14 the protection of the public interest in the due admin-
15 istration of justice. In order to convict the defendant
16 of the crime charged in Count 7, the government must prove
17 each of the following elements beyond a reasonable doubt:

18 The first element is that the defendant knew that
19 a proceeding was pending in a court of the United States.
20 In this connection I charge you that a federal grand jury
21 proceeding, and also a proceeding leading to the issuance
22 of an arrest warrant, are both proceedings in a court
23 of the United States.

24 The second element is that the defendant
25 endeavored to influence, obstruct, or impede the due

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2 administration of justice. To influence, obstruct
3 or impede, those together cover any attempt to interfere
4 with the due administration of justice. The particular
5 interference here charged was Lofland's attempt to get
6 Myrtle Rupe to mail to Howard Cerny in New York a
7 false affidavit exonerating him of fraud.

8 The indictment charges that Myrtle Rupe was a
9 material witness to Lofland's fraud, and in this connection I
10 instruct you that one is a witness within the meaning
11 of Section 1503 when he or she knows and is supposed to know
12 material facts and is expected to be called upon to testify
13 as to them.

14 Due administration of justice, as used in the
15 statute, refers to the fair, impartial, uncorrupted and
16 unimpeded consideration of any matter, civil or criminal,
17 pending in the courts of the United States. It includes
18 every step in a pending case, and of course it includes the
19 grand jury investigation of the charge.

20 The third element that the government must prove
21 beyond a reasonable doubt as to Count 7 is the defendant,
22 in obstructing the due administration of justice, did
23 so corruptly. The word "corruptly" as used in this
24 statute simply means having an improper motive or purpose.

25 You should note carefully that while the

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2 government contends there has been testimony from which you
3 can infer, if you so choose, that Mr. Lofland was promising
4 money to Mrs. Rupe in return for this affidavit you need
5 not find that there was any money or other consideration which
6 the defendant either gave or promised in order to find
7 that he acted corruptly.

8 I charge you as a matter of law that any unauthorized
9 endeavor, effort or act to influence, obstruct or
10 impede the proceeding is corrupt.

11 I want to emphasize that the success or failure
12 of an alleged corrupt endeavor is not material and is not
13 an element of the offense of obstruction of justice.

14 The law does not make guilt dependent upon the degree of
15 success or failure. The defendant is charged in Count 8
16 with a violation of Title 18, Section 1510. That statute
17 in pertinent part reads as follows:

18 "Whoever wilfully endeavors by means of
19 bribery, misrepresentation, or intimidation, to obstruct,
20 delay, or prevent the communication of information
21 relating by a violation of any criminal statute of the
22 United States to any person to a criminal investigator is
23 guilty of a crime."

24 Count 8 of the indictment reads as follows:

25 "On or about the fifth day of June, 1975,

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21 With respect to this first element I charge you
22 that misrepresentation and intimidation have the same mean-
23 ings here that they have in the previous statute we
24 talked about, and that bribery here has its every day
25 meaning of bestowing or promising to bestow something of

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value in order to corrupt the conduct of another.

3 Further, I instruct you here, as elsewhere,
4 that while the indictment reads in the conjunctive --
5 that is, it charges Lofland used bribery, misrepre-
6 sentation and intimidation to obstruct justice -- the statute
7 itself reads in the disjunctive, and consequently you need
8 only find here that the defendant used bribery or misrepre-
9 sentation or intimidation.

10 Finally, I instruct you that the federal
11 criminal laws as to which the government charges Myrtle
12 Rupe was obstructed from communicating information are the
13 mail fraud, wire fraud, and travel fraud laws which we have
14 previously discussed.

15 In this regard I charge you that it is not
16 necessary that the government prove that Mr. Lofland knew
17 about these particular laws, but only that as to
18 information which in fact related to violations of those
19 laws he knew Myrtle Rupe had some such information and he
20 knew that she had communicated it or that he believed she
21 was about to communicate it, or both.

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2 individuals authorized to conduct or engage in investi-
3 gations of such violations. That is to say, authorized
4 federal criminal investigators.

5 I instruct you that FBI agents and Assistant
6 United States Attorneys are authorized federal criminal
7 investigators in terms of this statute.

8 Third and finally you must find that Lofland knew
9 that the recipient or the intended recipient of Myrtle
10 Rupe's information was a criminal investigator. That is to
11 say, that he knew she had been talking or was going to be
12 talking to the FBI and or the United States Attorney's
13 office with respect to the information that he sought to
14 hinder her from communicating to them.

15 You have heard me mention along the way
16 certain contentions of the government. The defendant
17 in this case contends that he acted in good faith at all times
18 that he intended to complete the country club according to the
19 plans, that Mrs. Rupe and Mrs. Armstrong were familiar with
20 his background and financial condition, and that the
21 various loan applications were made in good faith and
22 indeed on many occasions he was accompanied by Mrs. Rupe.
23 The fact that these applications did not reach fruition
24 was in part due to economic conditions and to Mr. Lofland's
25 credit standing.

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2 These are the defendant's contentions.

3 Now, I am not going to summarize the
4 evidence in this case because it has not been so long and
5 counsel have summed it up well, but I do wish to refresh your
6 recollection as to those witnesses who appeared before you.

7 The government called the following witnesses.

8 The government called Myrtle Rupe, and Mr. Cecil Schnepf,
9 who was the pool builder, in Kansas, and Mr. David Cole,
10 who was the representative of the Arnholz Coffee people, a Mr.
11 Vane Higgins, who was the Liberal, Kansas construction
12 man, and Mrs. Angela Burke who testified as to certain
13 addresses at which she lived, a Mr. Eugene Batie, a
14 farmer from Tucumcari who moved his buildings off certain
15 property, a Miss Cynthia West, a Dr. Stokes, the owner
16 of the house on Keystone Lake, Mr. Lester Mc Ghee, the
17 business venture promoter who testified, among other
18 things, to certain conversations with Mrs. Rupe, a Mr.
19 Arnold Goodman, a New York lawyer connected at relevant
20 times with Paramuse and with Lee Reynolds, who testified,
21 among other things, to a movie deal with a Dr. Denne, a
22 Mr. James Spencer, a former sea captain who became the
23 chairman of the executive committee of the Antilles Bank,
24 a Mr. Donald Stangle took the stand, you may recall,
25 but there was then a stipulation with regard to his

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2 testimony as to certain purported signatures of Mr. Bennett
3 on certain instruments, a Mrs. Louise Dennison who you may
4 recall testified, among other things, in 1971 she invested
5 some \$10,000 in oil leases Mr. Lofland said he owned in
6 Lee County, a certified public accountant in Dallas, who
7 testified to preparing a financial statement for Mr.
8 Lofland based on statements Mr. Lofland gave him, Bing
9 Bennett, the president of Professional Underwriters Life,
10 Mr. Thomas Myers of the FBI, and the government's last
11 witness was Mrs. Esther Armstrong.

12 The defendant called as witnesses Mrs. Myrtle
13 Rupe and Mr. Rakoff. The government then called as a
14 rebuttal witness Mr. Myers of the FBI.

15 Now, I am getting close to the end, ladies and
16 gentlemen. I want to say that just because evidence is
17 uncontradicted in the record you need not accept it if you
18 don't find it to be believable. You alone, as I have said
19 before, are called upon to decide the facts here.

20 Now, how do you do this? How do you determine
21 the credibility of witnesses? This is obviously a threshold
22 question in determining what the facts are. This depends
23 very largely upon the impression that a witness or witnesses
24 made upon you. Was that witness telling the truth or giving
25 you an accurate version of what happened?

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2 As I said when you walk in the door of this
3 courtroom and you sit in the jury box you keep your common
4 sense and your good judgment with you. You decide whether
5 a witness has told a straightforward and truthful story,
6 whether the witness has attempted to conceal anything,
7 whether there was a motive to testify falsely, whether
8 there was a reason that a witness might color his or her
9 testimony. The ultimate question for you to decide in
10 passing upon credibility is did the witness tell the truth
11 here before you as to essential matters? It is for you to
12 decide whether a witness at this trial is truthful in whole
13 or in part in the light of his or her demeanor and all the
14 evidence of the case.

15 The fact that any witness here was a government
16 employee does not entitle that testimony to any greater
17 weight or consideration than that accorded to any other
18 witness in the case. I hardly need to say that it is
19 entitled to no less consideration. It is entitled to the
20 same consideration, and you are to evaluate such
21 testimony and credibility of such a witness the same
22 way as you would that of any other witness.

23 If you find, ladies and gentlemen -- and this
24 applies to all witnesses -- if you find that any witness has
25 testified falsely as to any material matter you may reject

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2 the entire testimony of that witness or you may accept such
3 part as commends itself to your belief or which you may find
4 is corroborated by other evidence in the case.

5 If you find a reasonable doubt as to the question
6 whether the defendant, Mr. L and, committed one or any or all
7 of the offenses charged he you should not hesitate
8 to acquit him on such count or counts. But, on the other
9 hand, if you find beyond a reasonable doubt that the law
10 has been violated as charged you should not hesitate because
11 of sympathy or any other reason to render a verdict of
12 guilty as a clear warning to the public that crime of this
13 character may not be committed with impunity.

14 Now, Mr. Lofland did not testify in this case
15 on his own behalf. Under our Constitution he had no obli-
16 gation to testify or to present any other evidence because,
17 as I have said, the burden of proof is solely upon the govern-
18 ment as to all elements of this case, and that burden
19 remains upon the government throughout the entire trial
20 and does not shift.

21 Therefore, you may not consider in any way
22 whatsoever, or attach any significance to the fact that Mr.
23 Lofland availed himself of his constitutional right not to
24 testify. No adverse inference may be drawn against him by
25 you because of his exercise of this privilege. In short, the

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2 fact that Mr. Lofland did not testify may not be considered
3 by you at all.

4 Now, the government to prevail must prove the
5 essential elements of each of the charges by the required
6 degree of proof as I have charged you. If the government
7 has succeeded your verdict should be guilty as to that
8 charge. If it has failed your verdict must be not guilty.

9 Your verdict, ladies and gentlemen, must be
10 unanimous. Your function, as I have said before, but I wish
11 to repeat, is to weigh the evidence in this case, determine the
12 guilt- or innocence of Mr. Lofland solely upon the basis of
13 that evidence and upon my instructions.

14 Under your oath as jurors you cannot and you
15 are not to allow any consideration of a sentence which
16 might be imposed upon the defendant, if convicted, to
17 enter into your deliberations or influence your verdict in any
18 way. Your duty is to decide the facts here, to decide
19 this case solely upon the evidence before you.

20 In the event of a conviction, the duty of
21 imposing sentence would rest solely with the Court.

22 Each of you ladies and gentlemen as a juror is
23 entitled to his or her own opinion. But each should,
24 however, exchange views with your fellow jurors. That is
25 what jury deliberations mean: To discuss and consider the

1 mdbr 12

2 evidence, to listen to the arguments of fellow jurors, to
3 present your individual views, to consult with one another,
4 and to reach an agreement based solely and wholly upon the
5 evidence, if you can do so without violation of your individ-
6 dual judgments.

7 Each must decide the case for himself or herself
8 after consideration and discussion with his or her fellow juror
9 but you should not hesitate to change an opinion which after
10 discussion with your fellow jurors appears erroneous.

11 However, equally, if after careful consideration of all the
12 evidence, the arguments of your fellow jurors, you entertain
13 a conscientious view that differs from others you are not
14 to yield your convictions simply because you are outnumbered
15 or outweighed. The final vote must reflect your
16 conscientious conviction as to how the issue should be
17 decided.

18 If the government has failed to carry its burden
19 as to any count you should acquit on that count. That
20 is your duty. However, if the government has carried its
21 burden you must not flinch from your sworn duty, but you must
22 convict.

23 Ladies and gentlemen, that concludes my charge on
24 the law.

25 Gentlemen, have you any matters to bring to my

1 mdb 13

2 attention?

3 MR. RAKOFF: None, your Honor.

4 MR. COVEN: No, your Honor.

5 THE COURT: Very good.

6 MR. COVEN: We do however request a side bar.

7 THE COURT: Very good.

8 Please stay in place. We will go in the robing room
9 for just a minute.

10 (In the robing room.)

11 THE COURT: Mr. Coven, any requests for exceptions?

12 MR. COVEN: Yes. Judge, I take exception first to
13 your Honor's statement about the public having to be assured
14 that a party shall not be -- something about impunity.
15 I don't remember the exact words. It came in towards the
16 end there. I can get my sheet.

17 THE COURT: I know what I said. I said if you
18 find a reasonable doubt the defendant has committed any one
19 or all of the offenses he is charged you should not hesitate
20 to acquit him on such count or counts, but on the other
21 hand if you find beyond a reasonable doubt the law has been
22 violated as charged you should not hesitate because sympathy
23 or any other reason to render a verdict of guilty as a clear
24 warning to the public that a crime of this character may
25 not be committed with impunity.

1 mibr 14

2 MR. COVEN: I think that is very prejudicial.

3 MR. RAKOFF: It is a standard charge given about
4 5,000 times.5 THE COURT There is a case United States v.
6 Alessandro that has approved of that.7 MR. COVEN: The only other thing that bothers
8 me is I see no reason for an aiding and abetting charge in
9 this case. There is no principle here.10 THE COURT: I think this could apply to such
11 situations as Michael Gardner, and the Denne situation.12 MR. COVEN: Denne is only with specific intent
13 to defraud.14 THE COURT: Your exception is noted, Mr. Coven,
15 because I have the jury sitting there.

16 Anything else?

17 MR. SCHACHTER: Yes. When your Honor was speaking
18 about Count 5 you gave an example saying that the jury could
19 consider Myrtle Rupe travelling after a phone call with
20 the defendant. I think that that gave possibly the jury
21 the impression that your Honor was stating that Myrtle
22 Rupe travelled after a telephone call with defendant while
23 it was actually after a telephone call with Michael Gardner.24 MR. RAKOFF: I disagree with that, your Honor.
25 The telephone records show conclusively she had one phone

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2 call with Michael Gardner, she had two phone calls the
3 same day with Lofland, she had a phone call the next day
4 with Lofland, she had a call after that with Lofland which
5 mentioned travelling.

6 MR. SCHACHTER: She testified she decided to travel
7 after a telephone call with Mr. Michael Gardner.

8 THE COURT: That's for the jury to grapple with.
9 Anything else?

10 MR. COVEN: No.

11 THE COURT: Okay.

12 (In open court; jury present.)

13 THE COURT: Ladies and gentlemen, you may
14 retire and consider your verdict.

15 Mrs. Gaines, I am going to have to excuse you at
16 this point with my thanks for your service and your attention
17 to the evidence as it went along.

18 MR. COVEN: Your Honor, would you ask the
19 jurors who are being excused a question of whether she dis-
20 cussed any of this case with the other jurors?

21 THE COURT: No, I decline to do that.

22 (Marshals sworn at 2 o'clock.)

23 (Jurors excused at 2 o'clock.)

24 (In open court; jury not present.)

25 THE COURT: I assume the jury has already gotten

1 mdb 16

2 a copy of the indictment.

3 MR RAKOFF: Yes, redacted.

4 THE COURT: I assume they are going to ask for cer-
5 tain exhibits. Might be stipulated they will all be
6 put in one place, and when the jury asks for them they will
7 be given by the clerk without the necessity of everything
8 convening, including the reporter, and the Judge.

9 MR. RAKOFF: That is fine.

10 MR. COVEN: Yes.

11 MR. SCHACHTER: Your Honor, I have one question
12 as to the defendant's eating. He would like to stay here,
13 your Honor, rather than go.

14 THE MARSHAL: We can have him up here in five
15 minutes. Lunch is provided as usual.

16 THE COURT: We will go about that in the formal
17 fashion.

18 (In the robing room; 3:40 p.m.)

19 THE COURT: Mr. Schachter, we have a note here,
20 Mr. Rakoff went to lunch, were you prepared to act in his
21 absence? This has to do with exhibits the jury wants.

22 It reads "Exhibits related specifically to
23 the 8 counts as outlined in the indictments."

xx 24 (Note marked Court Exhibit 1.)

25 THE COURT: I propose, if you have no objection,

1 mdbl 17

2 to pen my own little note under there saying can you be
3 more specific?

4 MR. SCHACHTER: I would request that, your Honor.
5 I had seen this, and didn't understand it myself. Could you
6 please be more specific as to the exhibit or exhibits
7 desired.

8 Signed Judge Owen.

9 Give that back to the marshal.

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2 (In open court; 4:00 p.m.)

3 (Jury not present.)

4 THE COURT: Mr. Rakoff, in your absence, the jury
5 asked for Mrs. Rupe's testimony the first time she was on
6 the stand with regard to the affidavit that got torn up.

7 I think we have located the pages from your transcript which
8 I have in front of me.

9 Further, they want the testimony that is Count 1,
10 the thousand dollar telegraphic money order that was Count 2,
11 and the \$3,000 check for Armstrong which is 3.

12 We have gone through the transcript and as far as
13 I can tell pages 293 through 300, and I made some pencilled
14 notations in there of a very light sort, and pages 307 and
15 308, starting at the bottom of 293, and then going to page
16 300 --

17 MR. RAKOFF: I assume without the side bar part.

18 THE COURT: Yes. And then pages 307 and 308.

19 MR. RAKOFF: Then there was later on.

20 THE COURT: They want the first testimony of Mrs.
21 Rupe relating to affidavit as prosecution witness.

22 THE COURT: I don't see anything further.

23 MR. RAKOFF: There was one place on cross which
24 is what I am trying to find, your Honor.

25 THE COURT: I am going to step out for one

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2 minute, and I don't think you will find it. I looked
3 through there and I couldn't find anything.

4 MR. PAKOFF: We have agreed there is one tiny
5 fragment on cross on page 366, line 9 through 367, line 10.

6 THE COURT: Yes.

7 (Continued on next page.)

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2 (In open court; jury present.)

3 THE COURT: Ladies and gentlemen, your fourth
4 request was for the first testimony of Myrtle Rupe regarding
5 affidavit as prosecution witness. We are now prepared to
6 read that to you.

7 (Record read.)

8 MR. RAKOFF: Could it be reflected that the
9 very last part you are now about to read is on cross
10 examination?

11 THE COURT: Yes. That was direct examination.

12 (Record read.)

13 THE COURT: You may retire.

14 (At 4:30 p.m. the jury returned to
15 the jury room to continue their deliberations.)16 (At 5:15 p.m. a note was received from the
17 jury.)

18 (In the robing room.)

19 THE COURT: What is the problem? This has
20 to do with the thousand dollar telegraphic money order,
21 Count 6.

22 MR. RAKOFF: Right. Your Honor, the govern-
23 ment would contend that the real testimony is Rupe, pages
24 230 through 237 and Mc Ghee, pages 639 and 640. That
25 covers the \$4,000 money going to Myrtle; she then being

1 gabr 2

2 told by Lofland that it is supposed to be for various
3 expenses, including send a thousand dollars back to me and
4 then the sending of the thousand dollars.

5 Without that conversation with Lofland, it
6 doesn't seem to me to make sense about just sending the
7 thousand dollars. It doesn't put it into any framework
8 whatsoever.

9 So that's the pages that the government would
10 like to include.

11 THE COURT: Mr. Schachter.

12 MR. SCHACHTER: The defense contends that the
13 question asked by the jury is the one thousand testimony
14 concerning I believe the one thousand dollars -- what was
15 it?

16 THE COURT: A telegraphic money order from
17 Myrtle Rupe to Lofland.

18 MR. SCHACHTER: Right. I would contend that
19 that is the only testimony they should now hear. The
20 testimony as to the money going from Mc Ghee to Mrs. Rupe
21 was not requested.

22 MR. RAKOFF: The testimony on the thousand
23 dollars itself would be about a page at most. It seems
24 to me it would not make any sense --

25 MR. SCHACHTER: Possibly we could ask the jury

2 to be more specific, to elaborate on that request.

3 THE COURT: Mr. Rakoff, you want to add what?

4 What does Mc Ghee say? ~

5 MR. RAKOFF: The Mc Ghee part which is a page or
6 two, he simply says that he was told that Mrs. Rupe was
7 angry because he hadn't put up any part of the advance
8 fee and so he said, well, I will send her \$4,000, but he
9 thought it was to go into escrow and it was not.

10 I am more concerned, although I think that is
11 certainly relevant -- I am more concerned with Rupe's
12 testimony which, if it were left as Mr. Schachter wants it,
13 I think it would come down --

14 THE COURT: What are we going to have from
15 Rupe's testimony? Is there a dispute of Rupe's testimony?

16 MR. RAKOFF: Yes.

17 MR. SCHACHTER: I don't believe that the
18 Mc Ghee testimony that was just read is relevant to this
19 jury request. The jury specifically requested the one
20 thousand dollars telegraphic money order from Mrs. Rupe.

21 THE COURT: No, they didn't ask that. They
22 asked pertinent testimony concerning Count 6. Then they
23 defined that as the one thousand dollar telegraphic money order
24 and they quote that language from the indictment, so they
25 are really talking about the pertinent testimony as to

2 the count. It is just a question of how --

3 MR. RAKOFF: The government's contention on
4 Count 6 at all times was this, that Lofland was telling one
5 story to Mc Ghee and the other to Rupe.

6 To Mc Ghee he said this is part of the advance
7 fee, your part. Send it to Rupe.

8 And he said: Well, you know, I have always
9 wanted to put it in escrow and Lofland said: Yes.

10 THE COURT: What do you want to read from
11 Mrs. Rupe that is disputed?

12 MR. RAKOFF: I would like to start "Did there
13 come a time when you had a conversation with Mr. Lofland
14 regarding Mc Ghee?"

15 She goes on to say that Lofland told her that
16 Mc Ghee was sending a check to cover expenses. She goes
17 on then listing how she spent the full 4,000, and the last part
18 of that is she sent a thousand dollars of it back to Lofland
19 and that thousand dollars is the specific telegraphic count
20 referred to in Count 6.

21 The government feels that without that back-
22 ground you don't have a very good idea of what Count 6 is
23 really all about.

24 THE COURT: Mr. Rakoff, suppose I were to rule
25 that you could read the Rupe testimony in its entirety

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2 without the Mc Ghee.

3 MR. RAKOFF: I would accept that as a fair
4 compromise.

5 THE COURT: They are asking about the count.

6 That has to do with the thousand dollars going to Lofland
7 in furtherance of the scheme to defraud, which is incorpor-
8 ated in there. I think you do have to go more than just
9 the mere fact of sending the thousand dollars.

10 MR. SCHACHTER: I remember, your Honor, we had
11 a bench conference at one point where we said that reading
12 the indictment, victims under the indictment would be
13 elderly widows, would be a reading of the indictment.

14 Are we contending now that the victim is
15 Mc Ghee or Myrtle Rupe? If it is Myrtle Rupe, what does
16 the money coming from Mc Ghee have to do with the money that
17 Myrtle Rupe ghen sends?

18 THE COURT: All that the jury has asked is,
19 "Pertinent testimony concerning Count 6 regarding the one
20 thou and dollar telegraphic money order sent from Myrtle
21 Rupe in Oklahoma City, Oklahoma to Lofland in New York-
22 in indictment."

23 MR. SCHACHTER: Under the indictment Count 6
24 relates to a scheme against Myrtle Rupe as a victim and the
25 pertinent testimony in Count 6 relates to Myrtle Rupe sending

1 gabr 6

2 money.

3 THE COURT: They have asked "pertinent testimony
4 concerning Count 6." I think it is more than just
5 the sheer actual sending --

6 MR. RAKOFF: The scheme that is alleged in
7 Count 6, of course, is the entire scheme. It is incorpor-
8 ated by reference in the introduction. This is a mailing
9 in furtherance of the scheme.

10 MR. SCHACHTER: Could I add one more thing,
11 your Honor? I am just saying that I would allow
12 testimony on what Mr. Lofland told Mrs. Rupe, the reason he
13 needed the thousand dollars and why she sent the thousand
14 dollars and that he called her and requested the thousand
15 dollars. I think that is what we have involved in
16 Count 6 and not what Mr. Mc Ghee was told.

17 MR. RAKOFF: I would accept that as a fair
18 compromise. What you are saying, we put in the full Rupe
19 part, but we don't put in the Mc Ghee part. I think that is
20 fair compromise of both positions.

21 MR. SCHACHTER: Okay. I will accept that without
22 the Mc Ghee part.

23 MR. RAKOFF: All right, fine.

24 THE COURT: Without reading Mc Ghee's testimony.

25 MR. SCHACHTER: Yes.

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2 The second element is that the defendant
3 endeavored to influence, obstruct or impede the due
4 administration of justice. To influence, obstruct or impede
5 those together to cover any attempt to interfere with the
6 due administration of justice.

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THE COURT: All right. I am prepared to go ahead
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on the other.4
(In open court; jury present.)5
THE COURT: Now, ladies and gentlemen, with
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regard to your first inquiry, "Pertinent testimony concerning
7
Count 6," we are prepared to read it to you.8
(Record read.)9
THE COURT: Ladies and gentlemen, you have
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a second question of me which is "Please explain difference
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between Counts 7 and 8 of indictment."12
What I am going to do, I am going to read to you
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portions of my charge that contain the elements that you
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must find beyond a reasonable doubt as to each of those
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counts before you could find the defendant guilty.16
In order to convict the defendant of the
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crime charged in Count 7 of the indictment, the government
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must prove each of the following elements beyond a
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reasonable doubt.20
The first element is that the defendant knew
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that a proceeding was pending in a court of the United
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States. In this connection I charge you that a federal
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grand jury proceeding and also a proceeding leading to the
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issuance of an arrest warrant are both proceedings in a
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court of the United States.

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2 simply means having an improper motive or purpose.

3 You should note carefully that while the
4 government contends that there has been testimony from which
5 you can infer, if you so choose, that Lofland was promising
6 money to Mrs. Rupe in return for this affidavit, you
7 need not find that there was any money or other consideration
8 which the defendant either gave or promised in order to find
9 that he acted corruptly.

10 I charge you as a matter of law that any
11 unauthorized endeavor, effort or act to influence, obstruct
12 or impede the proceeding is corrupt.

13 I want to emphasize that the success or failure
14 of an alleged corrupt endeavor is not material and is not
15 an element of the offense of obstruction of justice.

16 The law does not make guilt dependent upon the
17 degree of success or failure.

18 In order to find the defendant guilty of the
19 crime charged in Count 8 of the indictment you must find the
20 following elements beyond a reasonable doubt.

21 First, you must find an act by the defendant
22 of knowingly and wilfully endeavoring by means of bribery,
23 misrepresentation or intimidation to obstruct, delay or
24 prevent Myrtle Rupe from communicating information relating
25 to a violation of the federal criminal laws.

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With respect to this first element, I instruct you that misrepresentation and intimidation have the same meanings here as they had in the previous statutes we talked about, and that bribery here has the every day meaning of bestowing or promising to bestow something of value in order to corrupt the conduct of another.

8 Further, I instruct you that here, as elsewhere,
9 while the indictment reads in the conjunctive, that is, it
10 charges that Lofland used bribery, misrepresentation and
11 intimidation to obstruct justice, the statute itself reads
12 in the disjunctive and, consequently, you need only find,
13 here as elsewhere, that the defendant used bribery, misrep-
14 sentation or intimidation.

20 In this regard I instruct you that it is not f
21 necessary that the government prove Lofland knew about these
22 particular laws, but only that, as to the information
23 which, in fact, related to violations of those laws, he knew
24 Myrtle Rupe had some such information and he knew that she
25 had communicated it or he believed she was about to communi-

1 gabr 11

2 cate it or both.

3 Second, you must find that the action taken
4 by Lofland, that is in the first element that I have just
5 charged you about, must have been taken to obstruct, delay
6 or prevent the communication from being made or on account
7 of such communication having been made to an individual or
8 individuals authorized to conduct or engage in investigation
9 of such violations, that is to say, authorized criminal
10 investigators.

11 I instruct you that FBI agents and Assistant
12 United States Attorneys are authorized federal criminal
13 investigators in terms of this statute.

14 Third, and finally, you must find that Lofland
15 knew that the recipient or intended recipient of Myrtle
16 Rupe's information was a criminal investigator, that is to
17 say, that he knew she had been talking or was going to
18 be talking, to the FBI and/or the United States Attorney's
19 Office with respect to the information that he sought to
20 hinder her from communicating or injure her for having
21 communicated.

22 Now, ladies and gentlemen, that completes my
23 charge on those two counts. You may retire and deliberate
24 further.

25 (At 5:45 p.m. the jury retired to the jury

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2 room to continue their deliberations.)

xx 3 (Note marked Court's Exhibit 2.)

4 (At 5:50 p.m. a note was received from
5 the jury.)

xx 6 (Note marked Court's Exhibit 3.)

7 (6:20 p.m., in open court; jury present.)

8 THE CLERK: The members of the jury will answer
9 present as their names are called.

10 (Jury roll called; all present.)

11 BY THE CLERK:

12 Q Mr. Foreman, please rise.

13 Has the jury reached a verdict?

14 A We have.

15 Q What is that verdict on Count --

16 A Guilty on all counts.

17 Q Thank you.

18 THE CLERK: The members of the jury will listen
19 to your verdict as it stands recorded.20 You say you find the defendant guilty on all
21 counts, and so say you all.22 (Each juror upon being asked by the clerk,
23 "Is that your verdict?", answered in the affirm-
24 ative.)

25 THE COURT: Ladies and gentlemen, let me thank

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2 you for your careful attention to the evidence over these
3 days, your obvious careful deliberations during this after-
4 noon and the clear focusing obvious from the exhibits that
5 you called for and the exhibits that you wanted to consider.

6 May I say that given the record before you, I don't see how
7 your verdict could have been otherwise.

8 So you are discharged with my thanks having put
9 in substantial service as ministers of justice. I apprec-
10 iate that very much.

11 Good night.

12 (Jury excused.)

13 MR. RAKOFF: Your Honor, the government
14 would move to have the defendant remanded without bail
15 pursuant to Title 18, Section 3148.

16 THE COURT: Mr. Schachter, is there anything
17 you want to say on that?

18 MR. SCHACHTER: We intend, your Honor, to
19 appeal the decision. We would say that the defendant should
20 be held on the same bail conditions pending.

21 THE COURT: I will grant the motion. The
22 defendant is remanded without bail.

23 Do you have any motions, Mr. Schachter, you
24 want to make?

25 MR. SCHACHTER: Yes, your Honor, depending on whether

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2 the date of sentencing is. We would ask for an extension
3 of time to make motions to five days prior to sentencing.

4 THE COURT: I suppose there should be a
5 presentence report, although I am not all that clear as to why
6 it is necessary in this case.

7 MR. RAKOFF: Your Honor, although I would
8 agree probably that it is not necessary, I think the Court
9 of Appeals has indicated on a number of occasions that they
10 feel strongly that if there is not to be a presentence
11 report, the judge should indicate very clearly and
12 specifically why he doesn't feel there is a need for one
13 on the record.

14 THE COURT: Rather than run afoul of any
15 authorities of that kind, I will order one.

16 I don't think we need the usual six weeks
17 here, though.

18 MR. RAKOFF: I wouldn't think so, your Honor.

19 THE COURT: We will put this on for sentence on
20 the 19th of December.

21 MR. SCHACHTER: Can we have motions on the
22 12th then, your Honor?

23 THE COURT: What have you in mind in the way of
24 motions so that I get some idea of when you need to file
25 them?

4 * THE COURT: I would assume that there is really
5 only one motion that you want to make, and that is to pro-
6 tect your record.

7 In any event, if you want to serve them and file
8 them, the motion papers, on December the 12th, that will be
9 all right with me, returnable on the 19th.

10 MR. SCHACHTER: Thank you, your Honor.

11 THE COURT: All right.

12 MR. RAKOFF: Does your Honor know where you
13 will be on December 19th?

14 THE COURT: I will be here.

15 MR RAKOFF: What time?

16 THE COURT: 2:15 for sentence on December the
17 19th.

John P. O'Neill
FEB 13 1976